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15 ATTORNEYS FOR PLAINTIFFS

16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 SUSAN SIMON, individually and on behalf of
20 a class of similarly situated individuals,

21 Plaintiff,

22 v.

23 ADZILLA, INC. (NEW MEDIA), a Delaware
24 corporation; CONDUCIVE CORPORATION,
25 a Delaware Corporation; CONTINENTAL
26 VISINET BROADBAND, INC., a Delaware
27 Corporation; CORE COMMUNICATIONS,
28 INC. d/b/a CORETEL COMMUNICATIONS,
INC., a Delaware Corporation; and DOES 1-
50, Corporations Defendants,

Defendants.

Case No.: 09-cv-879 MMC

**PLAINTIFF'S RESPONSE TO
DEFENDANT CORE
COMMUNICATIONS, INC.'S
MOTION TO DISMISS**

Date: July 10, 2009
Time: 9:00 a.m.
Courtroom: 7, 19th Floor
Judge: Hon. Maxine M. Chesney

INTRODUCTION

2 Defendant Adzilla, Inc. (New Media) (“Adzilla”) partnered with the defendant Core
3 Communications, Inc. (“CoreTel”), among others, to engage in a practice known as “Deep Packet
4 Inspection,” (“DPI”) which allowed the defendants to intentionally intercept the private
5 communications of thousands of internet users without the users’ knowledge or consent.
6 Defendants did this because they were able to monetize the personal information gathered in this
7 process by using it for so-called “behavioral advertising.”

8 Plaintiff filed this suit (Dkt. 1) on behalf of herself and several putative classes on
9 February 27, 2009 against Adzilla, CoreTel, and several other entities. Core timely moved to
10 dismiss the Complaint on May 29, 2009. (Dkt. 32).

11 CoreTel moves to dismiss under FED. R. CIV. P. 12(b)(2), arguing that this Court lacks
12 personal jurisdiction over it because it claims it does not conduct any business in California and
13 because its DPI partner, Adzilla, was based in and run out of Canada, not California. In so doing,
14 CoreTel introduced new issues of fact that fall outside the allegations of the complaint that bear on
15 the matter of personal jurisdiction. Accordingly, Plaintiff needs to investigate these facts in order
16 to respond properly to CoreTel’s motion to dismiss.

STATEMENT OF FACTS

18 This case concerns the unauthorized interception of electronic communications
19 transmitted over the internet. (Compl. ¶ 1). Adzilla contracted with CoreTel and others to install
20 hardware directly into the networks of defendant internet service providers (“ISPs”) (Compl.
21 ¶¶ 31-32) and competitive local exchange carriers (“CLECs”) (Compl. ¶¶ 33-35) that capture all
22 data transmitted through these entities. (Compl. ¶ 25). Among these entities is defendant
23 CoreTel, a CLEC. (Compl. ¶¶ 20, 35).

24 By working together, Adzilla and CoreTel were able to collect vast quantities of
25 information about the ISP customers that connect to the internet via CoreTel. (Compl. ¶¶ 51, 57).
26 In fact, Defendants were able to track every online move made by the ISP customers, including the
27 web pages visited, log-ins and passwords at banking sites, and the content of emails sent and

1 received. (see Compl. ¶¶ 51, 88). Defendants then transmitted all of the data they silently
 2 collected to Adzilla's data center in California. (Compl. ¶ 73) where Adzilla analyzed this very
 3 valuable information to place so-called "behavioral advertisements." (Compl. ¶ 75). All of this
 4 was done in California and without the informed consent of the affected web users. (Compl. ¶¶
 5 81, 82, 84-87). Defendants were then able to use this very valuable information for so-called
 6 "behavioral advertising." (Compl. ¶¶ 45-47, 78). Adzilla and its ISP and CLEC partners shared in
 7 the revenue generated from these acts. (Compl. ¶ 83).

8 **STANDARD OF DECISION**

9 CoreTel moves to dismiss under FED. R. CIV. P. 12(b)(2).

10 Plaintiff carries the burden of establishing jurisdiction. *Farmers Ins. Exch. v. Portage La*
 11 *Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). The non-moving party may not rest on
 12 the allegations in the complaint; instead, the non-moving party must produce specific facts
 13 demonstrating that the court possesses jurisdiction. *Data Disc, Inc. v. Systems Technology*
 14 *Associates, Inc.*, 557 F.2d 1280, 1284-85 (9th Cir. 1977). The court may consider evidence
 15 presented in affidavits and other relevant materials to assist it in determining jurisdiction, and may
 16 order discovery on the jurisdictional issue. *Id.*; *Skidmore v. Syntex Labs, Inc.*, 529 F.2d 1244 (5th
 17 Cir. 1976).

18 **ARGUMENT**

19 Because CoreTel has raised the issue of personal jurisdiction, Plaintiff must provide facts
 20 beyond the Complaint's allegations to demonstrate that the Court possesses personal jurisdiction
 21 over CoreTel. *Data Disc*, 557 F.2d at 1284-85. For this reason, and because CoreTel has
 22 introduced new facts outside the Complaint's allegations by way of declarations attached to its
 23 motion to dismiss, Plaintiff is unable to respond at this time to CoreTel's motion to dismiss.
 24 Instead, Plaintiff needs to conduct limited jurisdictional discovery so that she can provide to the
 25 Court the necessary jurisdictional facts. For this reason, Plaintiff filed a Motion for Leave to
 26 Conduct Jurisdictional Discovery on June 19, 2009. (Dkt. 43). After Plaintiff conducts
 27

1 jurisdictional discovery, she will be able to respond to the pending CoreTel motion to dismiss in
2 the manner required by applicable law.

3 **CONCLUSION**

4 Plaintiff requires leave to conduct jurisdictional discovery in order to respond properly to
5 CoreTel's motion to dismiss. Accordingly, Plaintiffs request that CoreTel's motion to dismiss be
6 denied without prejudice, or alternatively, be stayed pending jurisdictional discovery.

7
8 Dated: June 19, 2009

KAMBEREDELSON, LLC

9
10 By: s/ Michael J. Aschenbrener
11 Michael J. Aschenbrener
12 Attorney for Plaintiffs

PROOF OF SERVICE

The undersigned certifies that, on June 19, 2009, he caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to counsel of record for each party, listed below:

Joseph Edward Addiego, III
Michael J. Aschenbrener
Gavin Lewis Charlston
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Corporations Defendants,

Defendants.

Case No.: 09-cv-879 MMC

**[PROPOSED] ORDER DENYING
DEFENDANT CORE
COMMUNICATIONS, INC'S MOTION
TO DISMISS**

Date: July 10, 2009
Time: 9:00 a.m.
Courtroom: 7, 19th Floor
Judge: Hon. Maxine M. Chesney

[PROPOSED] ORDER DENYING DEFENDANT
CORE COMMUNICATIONS, INC'S MOTION TO
DISMISS

Case No. 09-cv-879 MMC

1 On February 27, 2009, Plaintiff filed the present class action complaint alleging violations
2 of the federal Electronic Communications Privacy Act (“ECPA”) and Computer Fraud and Abuse
3 Act (“CFAA”), as well as state law claims under the California Invasion of Privacy Act (“CIPA”)
4 and California Computer Crime Law (“CCCL”), among other claims against Adzilla, Inc. (New
5 Media), Conducive Corp., Continental Visinet Broadband, Inc., and Core Communications, Inc.
6 d/b/a CoreTel Communications, Inc.

7 Defendant CoreTel filed a motion to dismiss for lack of personal jurisdiction under FED. R.
8 CIV. P. 12(b)(2).

9 For the following reasons, the Court denies CoreTel's motion to dismiss without prejudice.

10 Plaintiff carries the burden of establishing jurisdiction. *Farmers Ins. Exch. v. Portage La
11 Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). Plaintiff may not rest on the allegations
12 in her complaint; instead, she must produce specific facts demonstrating that the court possesses
13 jurisdiction over CoreTel. *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280,
14 1284-85 (9th Cir. 1977). The court may consider evidence presented in affidavits and other
15 relevant materials to assist it in determining jurisdiction, and may order discovery on the
16 jurisdictional issue. *Id.*; *Skidmore v. Syntex Labs, Inc.*, 529 F.2d 1244 (5th Cir. 1976).

17 Because Plaintiff must provide facts beyond those alleged in her complaint, Plaintiff must
18 be afforded the right to conduct limited jurisdictional discovery. Accordingly, the CoreTel motion
19 to dismiss is hereby dismissed without prejudice and Plaintiff is granted leave to conduct
20 jurisdictional discovery.

21 DATED: _____

By:

Hon. Maxine M. Chesney
United States District Court